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No. 73

In the Supreme Court of the United States

OCTOBER TERM, 1930

CHESAPEAKE & OHIO RAILWAY COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, GUYANDOT & TUG RIVER RAILROAD COMPANY, NORFOLK & WESTERN RAILWAY COMPANY, AND INTERSTATE COMMERCE COMMISSION, APPELLEES

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

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JANUARY, 1931.

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No. 73

CHESAPEAKE & OHIO RAILWAY COMPANY, APPELLANT

v.

UNITED STATES OF AMERICA, GUYANDOT & TUG RIVER Railroad Company, Norfolk & Western Railway Company, and Interstate Commerce Commission, Appellees

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINION BELOW

The opinion of the specially constituted District Court is reported in 35 F. (2d) 769. (R. 80.)

The report of the Interstate Commerce Commission (R. 31) is reported in 145 I. C. C. 167.

ABBREVIATIONS

Petitioner, Chesapeake & Ohio Railway Company, will sometimes hereinafter be referred to as

the C. & O. The Virginian Railway Company and its subsidiary, the Virginian & Western Railway Company, will sometimes hereinafter be referred to as the Virginian, applying that name indifferently to the parent company and its subsidiary. The Norfolk & Western Railway Company and its subsidiary, the Guyandot & Tug River Railroad Company, will sometimes hereinafter be referred to as the N. & W., applying that name indifferently to the parent company and its subsidiary.

QUESTIONS

By its order in the above-mentioned proceeding, involving applications by the C. & O., by the N. & W., and by the Virginian, for authority to construct lines of railroad in West Virginia, all of which would have covered the stretch along the Guyandot River between Itmann, a station on the Virginian, and Gilbert, a station on the C. & O., the Commission granted to the Virginian authority to construct a line from Itmann to Gilbert, and to the N. & W. authority to construct a line extending from a connection with its main line at Wharncliffe to a junction with the authorized line of the Virginian at or near Gilbert; denied the N. & W.'s application as to that portion of its proposed line which would have extended beyond Gilbert along the Guyandot River; and denied the C. & O.'s application *in toto*. The applicant railroads serve a large coal-producing territory in southern West Virginia. The Virginian's lines extend only to the east, but its shippers have outlets to the west over

routes made both in connection with the C. & O. and the N. & W. Those routes are circuitous, and the Virginian's authorized new line along the Guyandot with terminus at Gilbert, on the C. & O., will afford a more direct route for westbound coal, but only in connection with the C. & O. The Wharncliffe extension, which the Commission authorized the N. & W. to build, will make the direct route available to shippers in connection with the N. & W. as well as the C. & O. The C. & O.'s petition (dismissed by the court below) sought to have set aside that part only of the Commission's order which authorized the Wharncliffe extension.

The questions in issue before this court are:

1. Whether the lower court could, as asked of it, have assumed jurisdiction to enjoin the Commission's authorization for the extension from Gilbert to Wharncliffe separately from its authorization of the line from Itmann to Gilbert, since, if it had prevented construction of the Wharncliffe extension without restraining construction of the line from Itmann to Gilbert, the result would have been to substitute a plan of construction different from that administratively authorized by the Commission in disposing of a single traffic problem?

2. Whether the authority granted by the Commission to the Norfolk & Western to build the Wharncliffe extension subjected the C. & O. to such legal injury as entitled it to institute and maintain the suit?

3. Whether the Commission's order was supported by substantial evidence?

4. Whether the Commission, in reaching a determination that proposed extensions of lines of railroad are required by the public interest, may properly consider, among other things, the desirability of preserving competition between rival railroad systems?

STATUTE INVOLVED

The pertinent statutory provisions are paragraphs (18), (19) and (20) of Section 1 of the Interstate Commerce Act, as amended by the Transportation Act, 1920, c. 91, 41 Stat. 456, 477, 478 (U. S. C., Title 49, Sec. 1 (18), (19), (20)), which read as follows:

> (18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any

portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from time to time prescribe, and the provisions of this Act shall apply to all such proceedings. Upon receipt of any application for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance

of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

STATEMENT

1. PROCEEDINGS BEFORE THE COMMISSION

The Commission's order, a portion of which is here assailed, was entered in proceedings instituted by three separate applications, filed by the C. & O.,

by the N. & W.[1] and by the Virginian,[2] for certificates under section 1 (18) of the Interstate Commerce Act that the public convenience and necessity require the construction and operation of certain proposed lines of railroad in southern West Virginia described in the respective applications.

The extensive coal-mining districts of southern West Virginia are served by the three railroad systems above named. The lines of all three systems extend to the Atlantic Seaboard and the lines of the C. & O. and the N. & W. extend also to middle west gateways. Coal producers on the Virginian, however, have no outlet for western shipments except over routes made in connection with the C. & O. or the N. & W. Such shipments move via junction with the C. & O. at Deepwater, W. Va., the northern terminus of the Virginian, or via junction with the N. & W. at Matoaka, near the southeastern limit of the coal fields.

The C. & O.'s application, filed May 7, 1925, was for authority to construct an extension of its Logan subdivision in the Lower Guyandot Basin from Gilbert eastwardly along the Guyandot River to a junction with the Virginian at Mullens, and thence beyond Mullens to Stone Coal on its Winding Gulf Branch. (R. 32.) The N. & W.'s application, filed October 29, 1925, and amended December 24, 1925,

[1] Application filed by subsidiary Guyandot & Tug River Railroad Company and joined in by parent company.

[2] Application filed by subsidiary Virginian & Western Railway Company and joined in by parent company.

was for authority to construct a line extending westwardly from Elmore, a station on the Virginian in the Upper Guyandot Basin, along the Guyandot River to within about one mile of Gilbert, and thence across the divide to a connection with its main line at Wharncliffe. (R. 33, 34.) The Virginian's application, filed January 21, 1927, was for authority to construct a line from Itmann, on its Guyandot River branch, westwardly along the Guyandot River to a connection with the C. & O. at Gilbert. (R. 33.) There was no railroad along the Guyandot River between Itmann and Gilbert. All the proposed lines would have covered this stretch, which is about 40 miles in length. The C. & O.'s proposed lines would also have extended from Itmann about 12 miles eastwardly to Stone Coal, on its Winding Gulf branch. This extension would have closely parallelled an existing line of the Virginian. The N. & W.'s proposed line, in addition to covering the stretch along the Guyandot River to a point about one mile from Gilbert, on the C. & O., would have extended thence 10.5 miles southwestwardly across the divide to a connection with its main line at Wharncliffe. (R. 34; Map R. 16.)

The principal function of the proposed lines of all three carriers was the same, namely, to provide an outlet for westbound coal and other traffic, originating in the Upper Guyandot Basin east of the main line of the Virginian, over routes which would be less circuitous and freer from adverse grades

than the existing routes. The natural and direct outlet for such traffic was over a line which would extend from a connection with the Virginian westwardly along the Guyandot River (R. 34; Map R. 16), and, as hereinabove shown, the proposed lines of all three carriers followed this outlet. In 1927 coal moved westbound from this region at the annual rate of 4,444,464 tons, of which the greater proportion originated on lines of the Virginian. Nearly 80 per cent of westbound coal originating on the Virginian was shipped via Matoaka and the lines of the N. & W. The balance moved via Deepwater and the lines of the C. & O. (R. 38, 39, 92.)

A further function of the proposed lines was to carry the traffic that would be developed in the territory traversed thereby. That part of the Guyandot basin, lying west of the line of the Virginian and east of Gilbert, contains extensive deposits of coal, a large area of land bearing merchantable timber, about 30,000 acres of cultivated lands, 3,000 acres of pasture lands and a population of 6,500. The proposed route along the Guyandot River would pass through several towns not served by any railroad. (R. 35.) Of special importance to the applicant carriers was the enlargement of the coal reserves tributary to their respective systems which would be effected by the proposed extensions of their lines. Coal constitutes a very large proportion of the traffic of the three carriers (R. 49) and, consequently, the maintaining of adequate tributary reserves by each

said carrier is essential to ensure the maintaining of its revenues. The Virginian's tributary coal reserves are less than those of either of the two other carriers. While the N. & W.'s reserves are seven times as large as the Virginian's, they are only about 60 per cent as large as those of the C. & O. (R. 55.) To protect its coal reserves the N. & W. acquired in 1901, and has since maintained, control of the Pocahontas Coal & Coke Company which owns about 82,500 acres of coal lands that would be tributary to the proposed line along the Guyandot River. (R. 36, 55.)

Between Itmann and Gilbert both the Virginian and the N. & W. owned rights of way covering nearly all of their proposed routes. The C. & O.'s proposed location was made largely on the rights of way of the other applicants. (R. 48.) People of the local territory considered that the Virginian would afford them the most suitable outlet. (R. 54, 57.) More than two-thirds of the coal moving to the west from the Upper Guyandot Basin originated on the lines of the Virginian (R. 55), and that road already owned and operated a branch line extending part way down the Guyandot River from Mullens to Itmann. However, the Virginian's proposed line, covering alone the stretch from Itmann to Gilbert, would afford a direct route for westbound coal only in connection with the C. & O., whereas the longer line proposed by the N. & W., extending beyond Gilbert to Wharncliffe, on the main line of the N. & W., would make the direct

route available to shippers in connection with the N. & W. as well as the C. & O. Under the existing status of lines 80 per cent of westbound coal, originating on the Virginian, moved via Matoaka and the lines of the N. & W., and it was estimated by the N. & W. that a saving of 14 cents per ton would be effected by use of the proposed route down the Guyandot and extension to Wharncliffe. (R. 42.) Furthermore, there are large deposits of coal on Gilbert and Horsepen Creeks, estimated at from 120,000,000 to 170,000,000 tons, that would be tributary to the proposed Wharncliffe extension. (R. 91, 226, 229.)

The applications of all three carriers were, without objection, heard together. The Commission considered them as a whole in its report and disposed of them by one order. (R. 31–66.) By its order the Commission granted to the Virginian authority to build a line extending from Itmann down the Guyandot River to Gilbert, and to the N. & W. authority to build a line extending from a connection with the authorized line of the Virginian, at or near Gilbert, to Wharncliffe on its main line; denied the N. & W.'s application as to that portion of its proposed line which would have extended along the Guyandot River; and denied the C. & O.'s application *in toto*.

2. PROCEEDINGS IN COURT BELOW

December 8, 1928, appellant, C. & O., filed its petition to enjoin that portion only of the Commis-

sion's order which authorized the N. & W. to build the line connecting the authorized line of the Virginian with the N. & W.'s main line at Wharncliffe. January 3, 1929, the case was argued and submitted as on final hearing on the application for permanent injunction. November 16, 1929, the Court rendered its opinion upon final hearing. (R. 80.) December 14, 1929, final decree was entered dismissing the petition. (R. 97.)

SUMMARY OF ARGUMENT

I

The lower court properly held that it could not, as appellant requested, enjoin that part of the Commission's order which authorized the construction of the Gilbert-Wharncliffe line where no relief was sought as against the remainder of the order authorizing construction of the Itmann-Gilbert line. The two authorizations are interdependent, giving effect to a single administrative plan of lines; so that, if the Court had prevented the one part of the construction without preventing the other part, the result would have been to substitute a plan of lines different from that authorized by the Commission in disposing of a single traffic problem.

II

The appellant is without standing to maintain this suit to set aside authority granted the N. & W. to build the Gilbert-Wharncliffe line. The build-

ing of that line will deprive the appellant of a prospective competitive advantage which it would have had by reason of the fact that otherwise it would have been the sole carrier to connect with, and to receive westbound traffic from, the authorized Itmann-Gilbert line of the Virginian at its western terminus. Its interest, growing out of that prospective competitive advantage, entitled it to oppose in the Commission's proceeding the granting to the N. & W. of authority to build the Gilbert-Wharncliffe line, and to intervene in any suit brought under the Urgent Deficiencies Act, c. 32, 38 Stat. 208, 220, to set aside the authority after it had been granted. But it had no legal right to be the sole carrier to connect with, and to receive westbound traffic from, the authorized line of the Virginian at its western terminus, and, therefore, the Commission's order did not subject it to legal injury, entitling it to institute and maintain an independent suit attacking the validity thereof.

III

The Commission's order rests, not only upon the consideration that the preservation of competition between the N. & W. and C. & O. for westbound traffic originating on the Virginian will be in the public interest, but also upon a well rounded record of evidence, which is considered at length in the Commission's report.

IV

The Transportation Act, 1920, does not contemplate that the Commission should close its eyes to the benefits that may be secured for the public by the installation of competitive service any more than it contemplates that the Commission should disregard the harm that possibly might result from wasteful and improvident competition.

ARGUMENT

I. JURISDICTION CONFERRED BY URGENT DEFICIENCIES ACT TO ENJOIN A COMMISSION ORDER "IN PART" IS NOT APPLICABLE WHERE THE WHOLE ORDER RESTS UPON A SINGLE ADMINISTRATIVE PLAN

The Commerce Court Act (36 Stat. 539) conferred upon the Commerce Court jurisdiction over "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The Urgent Deficiencies Act (38 Stat. 219) transferred that jurisdiction of the Commerce Court to the several District Courts of the United States.

In *Procter & Gamble Co.* v. *United States,* 225 U. S. 282, it was held that the jurisdiction to set aside "any order"[3] of the Commission did not

[3] Valuation orders, orders relating to procedure and orders entered under Sec. 209 Transportation Act, 1920, have also been held not to be subject to the jurisdiction of the courts under the Urgent Deficiencies Act. *Los Angeles Valuation Case,* 273 U. S. 299; *United States* v. *Illinois Central,* 244 U. S. 82; *N. Y., O. & W. Ry.* v. *United States,* 14 F. (2d) 850, 273 U. S. 652; *Great Northern R. Co.* v. *United States,* 277 U. S. 172.

apply to a negative order, that is, an order which, as distinguished from an affirmative order requiring or authorizing some act to be done by the carriers, merely dismisses the proceeding and thereby denies the administrative relief prayed for. This holding was based on the ground, among other grounds, that the assumption by the courts of jurisdiction to grant relief in respect of orders of a character that leave the administrative status unchanged would be contrary to the legislative purpose in that such a jurisdiction would necessarily encroach upon the discretion in administrative matters, which Congress had exclusively entrusted to the Commission (pp. 295 to 299). Judicial review even of affirmative orders is confined to the legal questions as to whether there have been violations of the Constitution, a want of conformity to statutory authority, or an arbitrary exercise of power conferred.[4] But the setting aside on purely legal grounds of an affirmative order, requiring or authorizing some change in administrative status, would grant effective relief because the existing administrative status would thereby be maintained, whereas in order to grant relief (other than merely

[4] *Kansas City Southern Ry. Co.* v. *United States*, 231 U. S. 423, 439; *Manufacturers Ry. Co.* v. *United States*, 246 U. S. 457, 483, 489; *Interstate Commerce Commission* v. *Illinois Central R. R. Co.*, 215 U. S. 452, 470; *Interstate Commerce Commission* v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547; *Intermountain Rate Cases*, 234 U. S. 476, 490; *Skinner & Eddy Corporation* v. *United States*, 249 U. S. 557, 562.

declaring the law [5]) in respect of a negative order that leaves the administrative status unchanged, a court would have to substitute its judgment upon the administrative question.

Appellees submit that for the same reason the jurisdiction of a District Court to enjoin a Commission order "in part" applies only to a severable part of an order; and not to a part of an order that rests upon administrative considerations entering into the determination inducing the making of the balance of the order. For example, where an order prescribes reasonable rates between various points and there is no issue of rate relationship involved; each of its parts fixing rates between particular points would appear to be severable for purpose of a separate injunction suit. But, where the Commission, in reducing the rates of rival localities, has ordered like reductions to both localities with the consideration in mind of preserving an existing rate relationship, it is clear that, if a court were separately to enjoin the reduction in rates to one locality, the reduction in rates to the other locality left outstanding and in force would no longer have the support of the Commission's administrative judgment. [6]

In the instant case appellant, C. & O., has not attacked the Commission's order in so far as it

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[5] *Piedmont & Northern Ry.* v. *United States*, 280 U. S. 469.

[6] See comment in *United States* v. *Merchants, etc., Asso.*, 242 U. S. 178, 188, with respect to the enjoining of a portion only of a Commission order.

authorized the Virginian to construct the line of railroad from the Upper Guyandot Basin to a connection with the lines of appellant at Gilbert. Its petition sought to have set aside that part only of the Commission's order which authorized its competitor, the N. & W., to build the extension beyond Gilbert to a connection with N. & W. lines at Wharncliffe. It is apparent that the one part of the Commission's order is not so severable from the other part for purpose of a separate injunction suit because the two parts of the order give effect to a single administrative plan, that is, because the building of the line to Gilbert was authorized in contemplation of the building of the extension to Wharncliffe.

Emphasizing the need for the Wharncliffe extension the Commission said:

> "The construction of that part of the N. & W. proposed line from Wharncliffe to Gilbert would enable the N. & W. to compete with the C. & O. for westbound traffic from the Guyandot Valley, and would assure operators in the territory competitive service to the West. * * *" (R. 57.)

Shippers from the Upper Guyandot Basin now have outlets to the west over routes which, while being circuitous and having adverse grades, are made both in connection with the C. & O. and the N. & W.; and in 1927 nearly 80 per cent of all westbound coal originating on the Virginian was shipped via the lines of the N. & W. Construction

of a line terminating at Gilbert would afford a direct outlet from the Upper Guyandot Basin only in connection with the C. & O., whereas the further construction of the Wharncliffe extension would make the direct outlet available to shippers in connection with the N. &.W. as well as the C. & O. In short it would preserve for them the advantages of competitive service, including the advantages of additional routes to Kenova, Cincinnati, Columbus and other Ohio River gateways, of a fuller car supply and of a generally more expeditious movement of the traffic.[7]

The Commission, in summarizing its reasons for granting to the Virginian rather than to the C. & O., or to the N. & W., authority to build that section of the authorized new construction consisting of the line along the Guyandot River, said, among other things:

> "The Virginian needs its proposed line in order to have greater independence in the matter of an outlet for westbound coal. It appears that it can have no suitable outlet to the west except down Guyandot River, and it is not desirable to put the ownership of the line through this narrow mountain valley or gorge under the control of one of its competitors. * * *" (R. 56.)

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[7] Several outlets and ample car supply are of vital importance to producers of coal, particularly during periods of heavy coal movement.

As pointed out by the lower court, the Virginian "would still be bottled up if the only connection at Gilbert was with the C. & O., and the authorization of the Gilbert-Wharncliffe line seems to have been a means, in the minds of the members of the Commission, to prevent such condition." (R. 96.) Since coal originating on the C. & O. is in active competition with coal originating on the Virginian it is clear that an outlet for westbound coal over the C. & O. alone could not have been expected to secure for the Virginian and its shippers the independence which the Commission considered to be necessary.

Appellant asserts that the Virginian will not be "bottled up" if its sole connection at Gilbert is with the C. & O. "because its only interest in westbound traffic—divisions—is controlled by the Commission." The "independence in the matter of an outlet for westbound coal" referred to by the Commission relates not only to carrier revenue but to efficient through service rendered to producers of coal on the Virginian, namely, additional routes, a fuller car supply and prompt movement of the traffic. Moreover, the revenue situation would not be wholly cared for by the Commission control over divisions, particularly since the volume of traffic moving from mines on the Virginian may reasonably be expected to be greater if it has connection with both of its competitors in the originating of coal instead of with one only.

Furthermore, the maintaining of carrier revenue is of vital concern to the public convenience and necessity, for a carrier's ability to continue to render proper service to the public depends thereon. The revenues of all three carriers involved in the Commission proceeding are derived chiefly from the transportation of coal. While the tributary coal reserves of the N. & W. are much larger than those of the Virginian, they are only 60 per cent as large as those of the C. & O. (R. 55.) The N. & W. now receives a large amount of revenue from its participation in the westbound movement of coal from the Upper Guyandot Basin (R. 38, 39, 92), of which it would in large part have been deprived, if the court had prevented it from building the Gilbert-Wharncliffe extension while at the same time leaving the Virginian free to build the line from the Upper Guyandot Basin to a connection at Gilbert with the C. & O. only. The Commission, by authorizing the Virginian to build the line down Guyandot River to Gilbert, recognized that carrier's needs for additional coal reserves and for a more suitable outlet for westbound coal originating on its present lines.

Moreover, although the C. & O.'s application for authority to build a line down Guyandot River was denied, the line, as built by the Virginian, will connect with C. & O. lines at Gilbert, thereby enabling the latter to share in the westbound movement of coal originating along the new line of the Virginian and to continue to share in the westbound move-

ment of coal originating in the Upper Guyandot Basin. By authorizing the N. & W. to build the extension beyond Gilbert to a connection with its line at Wharncliffe, the Commission intended to afford the N. & W. substantial equality of opportunity to share in the westbound movement of coal originating along the new line of the Virginian and to continue to share in the westbound movement of coal originating in the Upper Guyandot Basin. (R. 57.) In short the Commission's order as a whole gives effect to its administrative judgment as to the respective traffic needs of the carriers, and the nice balance in this particular thereby established, would be destroyed if the one part of its order were set aside, leaving the other part outstanding and in force.

In view of the facts above mentioned, and others disclosed by the Commission's report, it must be concluded that the authority given the N. & W. to build the Gilbert-Wharncliffe extension involved considerations entering into the Commission's determination to authorize the building of the Itmann-Gilbert line. From which it follows that, if the lower court had separately enjoined the one part of the Commission's order, the other part left outstanding and in force would no longer have had the support of the Commission's administrative judgment. Certainly it cannot be said that, if the Commission had known that the one part of its order would be enjoined, it still would have prescribed the exact plan of lines contained in the

balance of its order. Under such circumstances it might, for example, have considered that its reasons for authorizing the Virginian to build and own the line along the Guyandot River should not be given controlling weight and, accordingly, it might have authorized the N. & W. to build the line along the river to Gilbert as well as the extension beyond to Wharncliffe. It might further have conditioned such authority upon the granting of trackage rights to the Virginian. (R. 56.)

The court could, of course, have entertained a suit to enjoin the Commission's order as a whole, for the enjoining of both parts of the Commission's order would merely have maintained the existing status of lines, giving the administrative body opportunity to determine upon a different plan. But, if the court had, as asked of it, enjoined that part of the order authorizing the Gilbert-Wharncliffe extension, leaving separately in force that part of the order authorizing the construction of the Itmann-Gilbert line, there would have resulted a new status of lines, unauthorized by the administrative body and disturbing to the traffic situation.

II. THE AUTHORITY GRANTED TO THE N. & W. TO BUILD THE LINE FROM GILBERT TO WHARNCLIFFE DID NOT SUBJECT THE C. & O. TO LEGAL INJURY, ENTITLING IT TO INSTITUTE AND MAINTAIN THE SUIT

The appellant, in effect, rests its right to maintain this suit to set aside that part of the Commission's order authorizing the N. & W. to construct the line from Wharncliffe to a connection

with the Virginian's authorized Itmann-Gilbert line, upon the ground (in substance) that the N. & W. will thereby be enabled to compete for traffic that would otherwise be exclusively enjoyed by the C. & O., namely, westbound traffic originating on the authorized line of the Virginian and westbound traffic that will be moved over that line from the Upper Guyandot Basin. (R. 14, 15.) But the appellant's showing that the Commission's order will deprive it of a prospective economic advantage by enabling its rival, the N. & W., to continue to compete effectively for westbound traffic originating on the Virginian is not enough to support its standing to maintain this suit.

Hines et al. v. *United States et al.*, 263 U. S. 143, was a suit brought to set aside as void an order of the Commission cancelling a penalty charge exacted by carriers on lumber held at reconsignment points. The penalty charge had been originally established by the Director General of Railroads "to prevent undue detention of equipment under the present emergency." Following Federal control it had been continued in modified form by the carriers in their tariffs. The penalty charge imposed a much greater handicap upon jobbers, who had no lumber yards, than on lumber manufacturers and dealers who customarily shipped direct from the mills to their own lumber yards. Plaintiffs in the case belonged to the latter class and their claim of right to maintain the suit was grounded primarily on the injury resulting to them from the Commission's

order arising out of the fact that the jobbers were thereby relieved from the handicap of the penalty charge. This Court in holding that they were without standing to maintain the suit said at page 148:

> "* * * But plaintiffs could not maintain this suit merely by showing (if true) that the Commission was without power to order the penalty charges cancelled. They must show also that the order alleged to be void subjects them to legal injury, actual or threatened. This they have wholly failed to do. It is not alleged that the carriers wish to impose such charges and, but for the prohibition contained in the order, would do so. For aught that appears carriers are well satisfied with the order entered. Cancellation of a charge by which plaintiffs' rivals in business have been relieved of the handicap theretofore imposed may conceivably have subjected plaintiffs to such losses as are incident to more effective competition. But plaintiffs have no absolute right to require carriers to impose penalty charges. Compare *Interstate Commerce Commission* v. *Chicago, Rock Island & Pacific Ry. Co.*, 218 U. S. 88, 111. Plaintiffs' right is limited to protection against unjust discrimination. * * *"

In *Alexander Sprunt & Son Inc., et al.*, v. *United States et al.*, 281 U. S. 249, involving a suit to set aside a Commission order which, by requiring a readjustment of rates, had deprived appellants of a competitive advantage enjoyed under existing rates, the Court said at page 254:

> * * * We are of opinion that appellants have no standing, in their own right, to make this attack. In so far as the order directs elimination of the rate differential previously existing, it worsened the economic position of the appellants. It deprived them of an advantage over other competitors of almost 3.5 cents per hundred pounds. The enjoyment of this advantage gave them a distinct interest in the proceeding before the Commission under section 3 of the Interstate Commerce Act. For, their competitive advantage was threatened. Having this interest, they were entitled to intervene in that administrative proceeding. And if they did so, they became entitled under section 212 of the Judicial Code to intervene, as of right, in any suit "wherein is involved the validity" of the order entered by the Commission. But that interest alone did not give them the right to maintain an independent suit, to vacate and set aside the order. Such a suit can be brought by a shipper only where a right of his own is alleged to have been violated by the order. * * *

The same doctrine has been applied in a suit brought, as in the instant case, by one carrier to set aside an order, entered by the Commission under section 1 (18) to (20) of the Interstate Commerce Act, authorizing another carrier to construct an "extension of its line of railroad." In *Pennsylvania Railroad Co.* v. *United States et al.*, 40 F. (2d) 921, there was involved an order of the Com-

mission granting an application of the Pittsburgh & West Virginia Railway for authority to extend its line into Donora, Pa., which community was then being served exclusively by the Pennsylvania Railroad. The latter had intervened in the Commission proceeding in opposition to the application and, after the authority was granted, it brought suit under the Urgent Deficiencies Act to set aside the order. The court dismissed the bill upon the ground, among other grounds, that the Pennsylvania Railroad was without standing to maintain an independent suit. In discussing this feature the court said (p. 925):

> * * * Being threatened by the Pittsburgh & West Virginia Railway Company, through its proposed extension, with competition for traffic in the Donora district, the Pennsylvania Railroad Company undoubtedly had such an interest in the application for the extension as entitled it to intervene and be heard. It did intervene and was heard. But that interest alone did not give it a right to maintain an independent suit to set aside the Commission's order. Such a suit can be brought and maintained by a competitor only where some right of its own has been violated by the order. SPRUNT & SON, INC. *vs.* UNITED STATES — * * * decided April 14, 1930. True, the complainant now is and for a long time has been exclusively serving Donora and is now receiving the profits from handling all the traffic flowing into and out of that busy district,

> But that is a privilege rather than a right—a privilege to be enjoyed so long as it shall last, not a right to be asserted,—unless it be found somewhere in the law—written or unwritten. Certainly there is no unwritten law that gives a carrier, first to serve a community, the right to hold its traffic against all competitors. It is equally certain that the written law—the Transportation Act of 1920—does not explicitly or implicitly accord a non-competitive traffic area to the first taker as the law accords a trade mark to the first adopter. * * *

Similarly in the case now before this court, while the appellant, C. & O., had an interest in the subject matter of the Commission's order, "that interest alone did not give it a right to maintain an independent suit to set aside" the order. Amendments added to the Interstate Commerce Act by Transportation Act, 1920,[8] require the carriers, before undertaking construction of new lines, to obtain the Commission's certificate that such construction is or will be required by the public convenience and necessity. But this provision can not be said to give to the C. & O. the right to be the sole carrier to connect with the authorized line of the Virginian at or near Gilbert and to receive through traffic from that authorized line when built. The C. & O. now has a line extending into Gilbert with which the authorized line of the Virginian will connect. By reason thereof it would enjoy a

[8] Section 1 (18)–(20) quoted above at page 4.

competitive advantage, if the N. & W.'s proposed connecting line should not be built, whereas, if it were built, it would not enjoy the competitive advantage. Its interest in that prospective competitive advantage entitled it to oppose in the Commission proceeding the N. & W.'s application for authority to build the connecting line, and to *intervene* in any suit brought under the Urgent Deficiencies Act[9] to set aside the Commission's order, authorizing the building of the line.

Furthermore, such prospective competitive advantage might have made it a "party in interest" entitled under section 1 (20) of the Interstate Commerce Act to enjoin the building of the line, if the Commission's authority therefor had not in fact first been obtained. Compare *Texas & Pacific Railway* v. *Gulf etc., Railway*, 270 U. S. 266. But the building of the line has been authorized by the Commission. And there can not be implied from provisions of law, which commit to the discretion of the administrative body the question as to whether proposed new lines are required by the public interest, the creation of rights in individual carriers to maintain suits attacking the validity of authority for the building of new lines granted

[9] Sec. 212 Judicial Code, which it was said in *Sprunt & Son* v. *U. S.*, *supra*, gave the plaintiff the right to intervene in, but not to institute, a suit to vacate a Commission order, was originally contained in the Commerce Court Act and is now applicable in suits under the Urgent Deficiencies Act. (U. S. C. Tit. 28, sec. 45a.)

thereunder to other carriers. The soundness of this is made particularly clear by giving consideration to analogous provisions of the Interstate Commerce Act, requiring the carriers to obtain administrative permission before undertaking the doing of other acts.

Section 20a of the Act forbids issuance by the carriers of any new securities until the Commission, after investigating the purposes of the proposed issue, by order grants its authority therefor. Assume that authorized securities of a carrier were to be used for the purpose of improving its existing service, or of strengthening its financial position generally, the carrier would thereby be enabled more effectively to compete with a rival carrier. The rival carrier would have an interest in the Commission's order authorizing issuance of the securities, for its economic situation would be worsened by the strengthening of that of its competitor. But clearly no legal right of the carrier would have been infringed, entitling it to sue to set aside permission given to another carrier to issue securities.

Section 5 of the Act imposes upon the Commission the duty of determining upon a plan for the consolidation of the rail carriers of the country into a limited number of systems, and requires carriers desiring to consolidate to obtain the Commission's authority therefor. Assume that a consolidation authorized by the Commission should

include a line which other carriers, planning to consolidate, desired to include in their system. The latter carriers could have appeared before the Commission in opposition to the inclusion in the rival system of the line in controversy, because their prospective economic interest would be involved. But it is apparent that they could not maintain a suit to set aside the Commission's order authorizing the consolidation, because they would be unable to show that the order had subjected them to legal injury. They could assert neither a right to have the carrier excluded from the rival system nor a right to have it join in their system.[10]

III. THE COMMISSION'S ORDER RESTS UPON SUBSTANTIAL EVIDENCE OF RECORD IN THE PROCEEDING

The C. & O.'s contention that there was no substantial evidence to support the authority granted the N. & W. to extend its line from Wharncliffe to a connection with the proposed line of the Virginian at or near Gilbert is apparently premised (1) upon the assumption that the Commission relied solely upon the consideration that the preservation of competition between the N. & W. and C. & O. for westbound traffic originating on the

[10] In *Chicago Junction Case*, 264 U. S. 258, involving an order of the Commission under section 5(2) of the Act authorizing the New York Central to acquire control of the Chicago Junction Railway, the standing of the Baltimore & Ohio and other carriers to attack the order was upheld because the order caused them injury by depriving them of the equality of treatment to which carriers are "as fully entitled as any shipper." See Sec. 3(3) Interstate Commerce Act.

Virginian would be in the public interest, and (2) upon its view that the Commission had misinterpreted the law in giving weight to that consideration.

The Commission necessarily and properly gave consideration to the fact that, if the Virginian was to be authorized to build the direct line down the Guyandot River to Gilbert, the building of the extension beyond Gilbert to a connection with the N. & W. would be essential in order to preserve in connection with the direct line the advantages to shippers of two routes and competitive service to the west, and in order to enable the N. & W. to share in westbound traffic originating on and moving over the direct line. But its report shows that other elements bearing upon its problem of what plan of lines would best serve the public interest were also given careful consideration.

1. The contentions made by the C. & O. to demonstrate that the Gilbert-Wharncliffe line is not required in the public interest show that its complaint of lack of any evidence is, in reality, a complaint as to the weight given by the Commission to the evidence before it

Coal produced in the Upper Guyandot Basin now moves westward at the annual rate of about 4,500,000 tons, of which the greater proportion originates on the lines of the Virginian. (R. 38, 39.) There are two routes available to the west, the one being via Matoaka and the lines of the N. & W. and the other being via Deepwater and the lines of the

C. & O. These routes are circuitous and have adverse grades. Coal shipped via Matoaka must ascend the long grade on the Virginian from Elmore to Clarks Gap, which rises 1,125 feet, with a maximum rate of 2.07 per cent and then move over a section of the N. & W. upon which the maximum grade is 1.10 per cent. (R. 39, Map R. 16.) Evidence submitted by the N. & W. (R. 213–214) and considered by the Commission (R. 42) showed that a proposed line from Elmore down the Guyandot River to Gilbert with extension beyond to Wharncliffe would reduce operating costs by about 14 cents per ton as compared with the costs over the route via Matoaka. (R. 213 to 214.)

The C. & O., however, contends that this evidence does not show that the Gilbert-Wharncliffe extension is required by the public interest, because the route via Gilbert and its line beyond would afford still greater economies in operation. But, if traffic always followed the route securing to carriers the greatest operating economies, there would have been no occasion for this suit by the C. & O. to prevent building of the Gilbert-Wharncliffe extension. In view of the fact that shippers on the Virginian now ship nearly 80 per cent of all westbound coal via Matoaka and the lines of the N. & W. it may be reasonably assumed that more traffic will move over the route down Guyandot River, if that route is made available both in connection with the N. & W. and the C. & O., than if it is made available in connection with the C. & O. only. To the

extent that shippers may continue to use the Matoaka route if the Gilbert-Wharncliffe extension is not built, the use of the direct outlet down Guyandot River will be curtailed and the full operating economies contemplated by the Commission's plan of lines will be prevented.

As bearing upon the transportation need for the Gilbert-Wharncliffe line for other than through traffic, the evidence showed that there were large deposits of coal on Gilbert and Horsepen Creeks, estimated at from 120,000,000 tons to 170,000,000 tons. The C. & O. contends that these coal deposits can be reached from either its line or the authorized line of the Virginian with equal facility. But there was testimony in the record that the deposits could best be developed by the Gilbert-Wharncliffe line or by a short branch extending from that line up Horsepen Creek. (R. 91, 226, 229.)

Furthermore, the record, considered generally, shows that the Commission had before it estimates of the traffic tributary to the present and proposed lines of the three carriers, figures with respect to present movements of traffic and estimates of future movements and earnings, evidence with respect to the physical features of the present and proposed lines, and estimates of the economies in operation expected to be accomplished by the installation of the proposed lines. As heretofore said, a large volume of coal now moves westbound from the Upper Guyandot Basin by two routes, the one made over the N. & W. and the other over the

C. & O. To the end of economical operation this traffic should move over the authorized line of the Virginian to Gilbert (R. 38), and the traffic that line will deliver to connecting carriers at Gilbert will be greatly augmented by traffic (chiefly coal and lumber) originating in the territory tributary thereto. (R. 35.)

All the above evidence was considered at length in the Commission's report and entered into its ultimate determination and finding that the public convenience and necessity required or will require the construction of the Gilbert-Wharncliffe line.

In *Colorado* v. *United States,* 271 U. S. 153, there was involved a Commission order authorizing, under the same provisions of the Act as are herein involved, abandonment by a carrier of a branch line of railroad. There this Court said, in referring to the discretion reposed in the Commission (p. 168):

> * * * The sole test prescribed is that abandonment be consistent with public necessity and convenience.

Earlier in the opinion the Court had said (p. 166):

> * * * The authority to find the facts and to exercise thereon the judgment whether abandonment is consistent with public convenience and necessity, Congress conferred upon the Commission.

In *Texas & Pacific Ry.* v. *Gulf etc., Ry.,* 270 U. S. 266, 273, this Court said that the question as to whether construction of a new line of railroad was

required by the public convenience and necessity was one for the administrative judgment of the Commission.

The various reasons advanced in appellant's brief (pages 32 to 41) to demonstrate that the evidence does not show that the line, connecting the N. & W. with the authorized line of the Virginian, is required by the public convenience and necessity resolve themselves into the one argument, that it is not so required because appellant's own connecting line is all that is required by the public convenience and necessity. In short, appellant is asking in effect, that the Court weigh the evidence and substitute its judgment for that of the Commission.

2. The public convenience and necessity may require construction of a line of railroad for the purpose of preserving an equality of opportunity between rival carriers to compete for traffic, and for the purpose of preserving, or securing, for shippers the advantages of competitive service

It has been above shown that the two parts of the Commission's order, the one authorizing the Virginian to build the Itmann-Gilbert line, and the other authorizing the N. & W. to build the extension beyond Gilbert to a connection with its line at Wharncliffe, give effect, among other things, to the Commission's judgment as to the respective traffic needs of the carriers. The building of the Itmann-Gilbert line will enable the Virginian, which has greater need for additional tributary coal reserves than the other carriers, to increase its reserves sub-

stantially. Since that line will connect at Gilbert with the C. & O., the latter will be enabled to share in the westbound traffic originating on the authorized Itmann-Gilbert line and also in the westbound traffic moving over that line from the Upper Guyandot Basin. The N. & W.'s tributary coal reserves are only 60 per cent as large as those of the C. & O. A great part of its westbound coal traffic transported from the Upper Guyandot Basin via Matoaka, from which it is now receiving a large revenue, will be diverted to the direct route of the proposed Itmann-Gilbert line. By authorizing the N. & W. to build the Gilbert-Wharncliffe line the Commission intended to afford the N. & W. substantial equality of opportunity to compete with the C. & O. for westbound traffic originating on the Itmann-Gilbert line and moving over that line from the Upper Guyandot Basin.

It seems clear that it was necessarily within the power of the Commission, in determining what plan of lines was required by the public convenience and necessity to have regard for the present and future traffic needs of the carriers. The public convenience and necessity are intimately concerned with the maintenance of a carrier's financial stability, for upon that will depend its ability to continue to render efficient service.

As to the effect of the building of the Gilbert-Wharncliffe line upon the C. & O., which now has an established line extending into Gilbert, with which the authorized Itmann-Gilbert line will con-

nect, it should be kept in mind that the traffic which will come to it over the Itmann-Gilbert line is not traffic now enjoyed by the C. & O. but is new traffic that will be developed on a new line authorized by the same order that authorized the Gilbert-Wharncliffe line, and traffic from the Upper Guyandot Basin that will be diverted by the new line from present routes—in large part from the route via Matoaka and the lines of the N. & W.

But even in the usual case of a carrier seeking to protect established business from invasion by another carrier, authority for the invading line granted by the Commission to the other carrier with the consideration in mind of enabling it to compete for the business, could not be attacked for lack of power in the Commission. True, the main objective of the provisions concerning new construction of lines is to prevent the building of unnecessary new lines (Texas & Pac. Ry. v. Gulf, etc., Ry., 270 U. S. 266, 277 [11]), because such would needlessly increase the aggregate property value upon which rates exacted from the public are required to be based. But the question as to whether a line is unnecessary (not "required by the public convenience and necessity") is a question of fact for the administrative determination of the Commission. (*Ibid.* p. 273.)

[11] In this case the building of a new line was enjoined because undertaken without the administrative authority of the Commission.

Since the invasion by one carrier of the territory of another necessarily establishes competition, the power given the Commission to authorize such invasion of itself negatives the idea that the benefits that may be obtained by establishing competition are not among the elements to be considered by the Commission. As emphasized by appellant, the paragraphs of the Act empowering the Commission to authorize new construction are among the interrelated provisions enacted by Transportation Act, 1920, with the main objective of promoting an efficient general transportation service for the public. But Section 15 (6), added by said Act, empowers the Commission to fix divisions of joint rates so as to give a weaker road "a division larger than justice merely as between the parties would suggest in order to maintain it in effective operation as part of an adequate transportation system." *Orient Divisions Case*, 265 U. S. 274, 284, 385. And Section 15a, added by said Act, provides for the recapture of excess earnings from the stronger carriers and the making of the fund available for the needs of weaker carriers. *Dayton-Goose Creek Case*, 263 U. S. 456, 479–480. Accordingly, it would not seem to be out of harmony with the spirit and purpose of the Transportation Act for the Commission, in authorizing a new line, to give consideration to the fact that it would enable the carrier to meet its traffic and revenue needs by competing for business with another carrier.

Similarly, there is nothing in the Act indicating that the Commission, when authorizing construction of a new line may not give consideration to the fact that the new line would secure for the shipping public the advantages of competitive service. Under the present status of lines, shippers in the Upper Guyandot Basin enjoy the advantages of two routes and competitive service to the west. The authorized line of the Virginian from Itmann to Gilbert will afford a more direct and economical outlet for the traffic. At Gilbert there will be connection with the C. & O., and the authorized extension beyond Gilbert to the line of the N. & W. will preserve for shippers, in connection with the direct outlet, the advantages of competitive service to the west.

The Commission gave as one of its reasons for authorizing the Virginian, rather than the C. & O. or the N. & W., to build the Itmann-Gilbert line, that the ownership of the line should not be under the control of one of its competitors because of the Virginian's need for greater independence in the matter of an outlet for westbound coal. (R. 56.) Such independence would not be secured, if the line's only connection at Gilbert was with the C. & O., whose producers of coal are active competitors of producers of coal on the Virginian. Competitive connecting lines at Gilbert were necessary to assure to the Virginian the independence regarded as necessary by the Commission, and to its shippers the advantages of additional routes, a

fuller car supply and expeditious handling of the traffic.

Although the Federal regulatory laws recognize that a considerable degree of monopoly is proper in the railroad business, nevertheless they likewise recognize that the restraints upon excessive charges and the stimulus to good service that result from competition can not be wholly replaced by regulation. Sections 7, 10 and 11 of the Clayton Anti-trust Act [12] (U. S. Code Title 15, sections 18, 20, 21) bear witness to the purpose to keep competition between carriers alive. Furthermore, one of the principal directions given by Congress to the Commission to guide the latter in formulating a plan for consolidation of the railways into a limited number of systems was that:

> "In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practicable the existing routes and chanels of trade and commerce shall be maintained." (I. C. Act, section 5(4).)

The Commision has, in other cases, recognized that the benefits growing out of competitive service are elements to be considered in authorizing construction of new lines. In *Construction of Lines in Eastern Oregon,* 111 I. C. C. 3, it was said at page 37:

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[12] For history of, and discussions under, this Act see Interstate Commerce Act, Annotated, Vol. 4, page 3057 et seq.

"* * * The advantages of a diversified car supply, recognized in the coal industry, are equally important to lumber producers. There are the possibilities of failures of operation or of management, calamities, labor disturbances, and surplus production or consumers' demands upon one railroad which might well be overcome if the service of another carrier were available. * * * Competition as a stimulus for efficient operation has been recognized by us."

In *Construction of Line by Wenatchee Southern Railway Co.*, 90 I. C. C. 237, it was said at page 256:

"It is probable that the competition afforded (by the construction of the proposed line) would stimulate the Great Northern to further improve its service. Competition, within reason, rather than monopoly, is in the public interest."

While, under some circumstances, the invasion by one carrier of territory served by another may be detrimental to the public interest, under other circumstances the reverse may be true. The question is one of fact, committed to the administrative discretion of the Commission. Clearly the Transportation Act, 1920, does not require the Commission to close its eyes to the benefits that may be secured for the public by the establishment of competitive service, any more than it expects it to close its eyes to the possible harm that may result therefrom. On the contrary it expects the

Commission to weigh all elements bearing upon the public interest in reaching a determination as to whether or not a proposed line is required by the public convenience and necessity.

CONCLUSION

The decree of the lower court denying the prayer for injunction and dismissing the petition for want of equity should be affirmed.

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